80-1207

No._____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID RUSK, MAYOR, et al., *Appellants*

v.

JOSEPH ESPINOSA, et al., *Appellees*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JURISDICTIONAL STATEMENT

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January 5, 1981

QUESTIONS PRESENTED

Did the lower court err by concluding that, as applied to Appellees, Albuquerque Ordinance No. 72-1975, which regulates the solicitation of funds within the City for charitable purposes, violates the First and Fourteenth Amendments of the United States Constitution because the ordinance:

a) contains a prohibited religious test and impinges upon Appellees' right of free exercise where the result of that religious test is *not* the denial of the right to disseminate religious views; and

b) is not a reasonable regulation governing the solicitation of funds by Appellees?[1]

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[1] The parties to the proceedings in the United States Court of Appeals for the Tenth Circuit were: David Rusk, Mayor; Patrick Baca, Joe R. Abeyta, Mel Aragon, Thomas W. Hoover, Sandra L. West, Alan B. Reed, Jo McAleese, Jim Delleney, Marion M. Cottrell, members of the City Council of the City of Albuquerque, New Mexico; and Bob V. Stover, Chief of Police of the City of Albuquerque, New Mexico (Defendants-Appellants in the court below and Appellants herein); Joseph Espinosa, Charles Shobe, Morton L. Dunkin, and General Conference Corporation of Seventh-day Adventists (Plaintiffs-Appellees in the court below and Appellees herein).

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Ordinances	2
Statement of the Case	3
The Questions are Substantial	7
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Cantwell v. Connecticut 8, 9
310 U.S. 296 (1940)

Committee for Public Education v. Nyquist 9
413 U.S. 756 (1973)

Hynes v. Mayor of Oradell 8
425 U.S. 610 (1976)

Walz v. Tax Commission 9
397 U.S. 664 (1970)

Constitutional Provisions:

First Amendment, United States Constitution 1, 2, 6, 7, 10

Fourteenth Amendment, United States Constitution 1, 2, 6, 7

Page

Statutes:

28 U.S.C. §1254(2) 2

28 U.S.C. §1291 2

28 U.S.C. §1343(3) 2

42 U.S.C. §1983 6

Ordinances:

Albuquerque Ordinance No. 72-1975 .... 1, 2, 3, 4, 5, 7, 8, 9

IN THE

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OCTOBER TERM, 1980

No. _____

DAVID RUSK, MAYOR, et al., *Appellants*

v.

JOSEPH ESPINOSA, et al., *Appellees*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States Court of Appeals for the Tenth Circuit, entered on October 21, 1980, holding that Albuquerque Ordinance No. 72-1975, which regulates the solicitation of funds for charitable purposes, violates the First and Fourteenth Amendments of the United States Constitution.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, which appears in the appendix hereto, p. 1a, *infra*, has not been reported.

The memorandum opinion of the United States District Court for the District of New Mexico, which appears in the appendix hereto, p. 15a, *infra*, is not reported.

JURISDICTION

Jurisdiction in the United States Court of Appeals for the Tenth Circuit was based upon 28 U.S.C. §1291. Jurisdiction in the United States District Court for the District of New Mexico was based upon 28 U.S.C. §1343 (3).

The judgment of the United States Court of Appeals for the Tenth Circuit, affirming the decision of the United States District Court for the District of New Mexico permanently enjoining the enforcement of Albuquerque Ordinance No. 72-1975 insofar as it applied to Appellees' Ingathering program, was entered on October 21, 1980.

A notice of appeal to this Court was filed in the United States Court of Appeals for the Tenth Circuit on December 27, 1980. See p. 26a, *infra*.

This appeal is being docketed in this Court within 90 days of the entry of the judgment below. The jurisdiction of this Court is being invoked under 28 U.S.C. §1254 (2).

CONSTITUTIONAL PROVISIONS AND ORDINANCES

First Amendment, United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

Fourteenth Amendment, United States Constitution:

[N]or shall any State deprive any person of . . . liberty . . . without due process of law. . . .

Albuquerque Ordinance No. 72-1975:

The text of the ordinance appears in the appendix hereto, p. 28a, *infra*.

STATEMENT OF THE CASE

The City of Albuquerque enacted Ordinance No. 72-1975 to regulate charitable solicitations within the city limits. Among the ordinance's stated purposes is preventing deceptive and dishonest statements and fraudulent conduct in connection with such solicitations. The ordinance establishes a permit system which is described below.

If a solicitor does not fall within an enumerated exemption, the solicitor is required to obtain a permit from the Albuquerque Solicitations Review Board (hereinafter, "the Board") before soliciting contributions. Ordinance No. 72-1975, Section 7. To obtain a permit, the solicitor must file an application containing certain documentation and information, including: the name of the charitable organization and the name under which it intends to solicit contributions; the names and addresses of the organization's national and local directors, trustees, and officers and local key personnel; the location of the organization's financial records; the methods by which the solicitation will be made; the names and addresses of any professional fund raisers acting on the organization's behalf; the general purpose for which the organization is organized; where and when the organization was legally established, the form of the organization, and the organization's federal exempt status; the purposes for which the contributions to be solicited will be used, and the total amount of funds proposed to be raised; the time during which the solicitation will be made; a financial statement of charitable collections made by the applicant during the preceding fiscal year; whether the organization is authorized by any governmental authority to solicit contributions, and whether it is or has ever been enjoined by any court from soliciting contributions. Ordinance No. 72-1975, Section 8.A-K. The ordinance also

authorizes the Board to obtain "[s]uch other information as may be reasonably required by the Board . . . provided that disclosure of names of donors or amounts of contributions shall not be required." Ordinance No. 72-1975, Section 8.L.

The Board then must determine whether the cost of the solicitation will exceed 30% of the gross amount to be raised; whether the advertising material and general promotional plan are false, misleading or deceptive; and whether the organization or its officers have been convicted of a crime involving charitable solicitations within the past ten years. In the case of application renewals, the Board also must determine whether the organization has complied with the provisions of the ordinance during the preceding calendar year. Ordinance No. 72-1975, Section 10. The permit *must* be granted if 45 days pass without action or if the Board determines that the application is complete and that the answers to the questions noted above are negative. Ordinance No. 72-1975, Section 11. If the application is approved, the applicant is required to pay a permit fee of $25.00. Ordinance No. 72-1975, Section 12.

If the Board determines that one of these very specific requirements has not been satisfied, the Board must notify the applicant that the application must be corrected with respect to specified deficiencies. Only if the requested corrections are not made, may the permit be denied. The denial must include the findings of fact which were the basis for the denial. The denial is not effective for 20 days, and during that time the applicant may petition for reconsideration and is entitled to a hearing. Ordinance No. 72-1975, Section 11.

The ordinance contains various exemptions, including one for:

> Solicitations by religious organizations which are entitled to receive a declaration of current tax exempt status from the government of the United States and their duly organized branches or chapters . . . if the solicitations are in the form of . . . solicitations by such organizations solely for evangelical, missionary, or religious but not secular purposes.

Ordinance No. 72-1975, Section 3.A.

The ordinance further defines "secular" as "not spiritual or ecclesiastical but rather relating to the affairs of the present world, such as providing food, clothing and counselling." Ordinance No. 72-1975, Section 2.L. One of the Board's enumerated powers is to "[d]etermine whether or not an organization is exempt from the provisions of . . . [the] ordinance and interpret upon request any provision of . . . [the] ordinance." Ordinance No. 72-1975, Section 6.G.

Any person violating any of the provisions of the ordinance will be deemed guilty of a misdemeanor. Ordinance No. 72-1975, Section 24.

This controversy began when the Seventh-day Adventist Church contacted the City in order to ascertain whether Ordinance No. 72-1975 applied to activities associated with the Church's annual solicitation drive, known as the Ingathering. The City informed the Church that many of the activities were secular and that the Church was required to conform to the ordinance's permit requirement. The Church was willing to provide the City with certain information required by the ordinance but refused to submit an application for a permit.

The Church and certain of its individual members then filed an action in the United States District Court for the District of New Mexico in which they sought injunctive and declaratory relief pursuant to 42 U.S.C. §1983. The parties stipulated to the pertinent facts, including those facts which are noted below.

The Church conducts an annual Ingathering program in most countries. During this drive, the members of the Church attempt to bring their spiritual message into every home in the nation. The members distribute literature and solicit contributions. In addition to evangelical purposes, the contributions are to be spent to provide food, clothing, shelter and money for the needy; summer camps for disadvantaged youth; counseling; health services; and education. The City advised the Appellees that the latter would all come within the meaning of "secular" as that term is defined in the ordinance and interpreted by the City. For the purposes of the ordinance, the Ingathering program has no costs.

The Church and the individual Appellees believe that the welfare programs which are funded by the Ingathering program constitute part of their biblical mission. They also believe that the door-to-door contacts during the solicitation with the citizens of Albuquerque are an important aspect of the free exercise of their religious beliefs as guaranteed by the First and Fourteenth Amendments of the United States Constitution.

The parties further stipulated that the Church is a "charitable organization" within the meaning of the ordinance. Appellees conceded that the protection of the public from fraud is a legitimate interest of the City.

The questions presented to this Court were raised in the pleadings filed in the District Court. The District Court found that the ordinance, as applied, embodies a religious test in violation of the First and Fourteenth Amendments. The court permanently enjoined the City from enforcing the ordinance insofar as the Ingathering program was concerned.

The City then appealed to the United States Court of Appeals for the Tenth Circuit. By way of briefs and oral argument, the questions herein were presented to that court. In a 2-1 decision, the court affirmed the lower court's decision, concluding, *inter alia*, that the ordinance embodies a prohibited religious test.

THE QUESTIONS ARE SUBSTANTIAL

The City of Albuquerque promulgated Ordinance No. 72-1975 in order to protect its citizens from fraudulent and deceptive practices in connection with charitable solicitations. Unlike a number of the charitable solicitation ordinances which this Court has reviewed and found constitutionally wanting, the ordinance in question was carefully drafted with an eye towards avoiding problems of vagueness and providing very specific standards. Clearly one of the principal public concerns addressed in the ordinance was an attempt to balance the interrelationship between that which is religious and that which is secular to protect the public against solicitations in the name of religion for secular purposes. Such a regulation necessarily raises sensitive constitutional questions, particularly with respect to the right of free exercise guaranteed in the First Amendment. While this Court has considered similar questions, the City submits that the questions presented in

this case are of first impression and are so substantial that they justify plenary review by this Court.

This Court consistently has recognized that the state has an important interest in protecting its citizens from the fraud and undue annoyance which may be associated with charitable solicitations. See, *Hynes v. Mayor of Oradell*, 425 U.S. 610, 616-619 (1976); *Cantwell v. Connecticut*, 310 U.S. 296, 306-307 (1940). The Court has also consistently indicated that such a regulation must be drawn with specificity, must not "vest in municipal officials the undefined power to determine what messages residents will hear," must not involve any "religious test," and must "not unreasonably obstruct or delay the collection of funds." See, 425 U.S. at 617; 310 U.S. at 305.

The City submits that the lower courts erred by not concluding that Ordinance No. 72-1975 is a reasonable regulation which satisfies the aforementioned constitutional standards. The ordinance in question is very narrowly drawn and does not vest unbridled discretion in the Albuquerque Solicitations Review Board. The requirements of the ordinance are reasonably related to a legitimate governmental purpose, and any burden upon religious organizations which must comply with the ordinance's permit requirement is *de minimis*. Most importantly, a determination, under the ordinance, that the purposes for which funds are solicited are not "evangelical, missionary or religious" does *not* render solicitation by a group claiming some religious affiliation unlawful or deny that group the right to disseminate religious views. Quite to the contrary, if the Albuquerque Solicitations Review Board finds in the light of the definition of "secular" that the purposes of a solicitation by a group claiming some reli-

gious affiliation are secular, the only consequence of that determination is that the group must obtain a permit and *disclose* to the public how the money solicited will be used.

The lower courts relied upon the *Cantwell* case as controlling because, in their view, Ordinance No. 72-1975 embodies a religious test which constitutes an impermissible prior restraint upon the free exercise of religion. However, reliance upon *Cantwell* is misplaced because that case is critically different from this one. Ordinance No. 72-1975 does not vest indiscriminate power in City officials to determine whether an organization is religious. The ordinance defines the term "secular"[2] and thereby excludes particular activities from the exempt category of solicitations for "evangelical, missionary or religious" purposes. However, this definition does not result in the evil which this Court sought to eliminate in *Cantwell*: the potential denial of the right to disseminate religious views.

If *Cantwell* is to be read that *any* administrative determination as to what is religious is objectionable, then the consistent statements of this Court that the state has an important interest in protecting its citizens from the fraud and undue annoyance which may be associated with charitable solicitations are meaningless. One must look to the *consequences* of such an administrative determination. To do otherwise would be to allow an individual to define his own religion and to exercise his individual beliefs free

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[2] This Court has expressly recognized the difference between the "secular" and "religious" activities of religious organizations. See, *Committee for Public Education v. Nyquist*, 413 U.S. 756, 775 (1973); *Walz v. Tax Commission*, 397 U.S. 664, 687-689 (1970). In neither of these cases was the recognition of this distinction considered to work a censorship of religion.

from governmental restraint of any type. That does not make sense and that does not comport with the consistent holdings of this Court.

This Court has indicated that a properly drawn regulation of the type at issue in this case may pass constitutional muster. However, such regulations have consistently failed to do so. The City of Albuquerque submits that Ordinance No. 72-1975 is constitutional. The ordinance in question presents the Court with an appropriate vehicle for further refining the law so that municipalities will be able to formulate ordinances which satisfy both the need of their citizens to be protected against fraud and the strictures of the First Amendment.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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January 5, 1981

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOSEPH ESPINOSA, CHARLES SHOBE, MORTON L. DUNKIN, and GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS,
Plaintiffs-Appellees,
vs.
DAVID RUSK, Mayor; PATRICK BACA, JOE R. ABEYTA, MEL ARAGON, THOMAS W. HOOVER, SANDRA L. WEST, ALAN B. REED, JO McALEESE, JIM DELLENEY, MARION M. COTTRELL, members of the City Council of the City of Albuquerque, New Mexico; and BOB V. STOVER, Chief of Police of the City of Albuquerque, New Mexico,
Defendants-Appellants.

No. 79-1477

Appeal from the United States District Court
for the District of New Mexico
D.C. No. 78-915-B

George R. "Pat" Bryan, III, City Attorney, City of Albuquerque, New Mexico (Susan Green, Assistant City Attorney, City of Albuquerque, New Mexico, on the briefs) for Defendants-Appellants.

Lee Boothby of Johns, Carson & Boothby (Warren L. Johns, Walter E. Carson, Robert W. Nixon of Johns,

Carson & Boothby with him on the briefs), Washington, D.C., for the Plaintiffs-Appellees.

Before BARRETT, DOYLE and McKAY, Circuit Judges.

DOYLE, Circuit Judge.

The issue before us is whether an ordinance of the City of Albuquerque, New Mexico, as applied to the plaintiffs, violates the first and fourteenth amendments of the Constitution of the United States. The ordinance involves licensing and regulation of solicitation carried on by charitable organizations including some religious groups. The ordinance is numbered 72-1955. [sic]

The Seventh Day Adventist Church challenges the application of the ordinance to its annual solicitation drive in Albuquerque. The drive is known as the Ingathering. The money received in the drive is used for the support of various activities of the Adventist Church. These activities include medical, community, evangelical and educational services[1]. The Church maintains that all of these activities are part of its religious mission and thus are not subject to the ordinances' regulation; that such is prohibited by the Free Exercise of Religion Clause of the first amendment to the Constitution. The mentioned clause of the Constitution is as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

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[1] Some of the monies raised are used for the purchase of food, clothing and shelter for those in need.

[1a] The due process and equal protection clauses of the fourteenth amendment restrict the state and city legislative bodies from encoraching [sic] on the free exercise of religion.

The church maintains that all of its activities serve to spread the religious message of the Church.

The ordinance purports to exempt "religious" activities but does not exempt secular activities.

The controversy commenced when the Church contacted the City for the purpose of ascertaining whether the ordinance applied to the activities of the Church - the Ingathering. The Church provided the City with certain information required by the ordinance but refused to submit an application for a permit. When the City informed the Church that many of the activities which were being carried on were "secular" and that it was required to conform to the permit requirement, the present action challenging the constitutionality of the ordinance was filed.

The suit sought injunctive relief against the enforcement of the ordinance. Based on a stipulation of the parties, the district court entered a preliminary injunction which allowed the Church to continue with its activities during the pendency of the action. Later the cause was submitted to the court on a stipulation of the facts. Oral arguments were had and a judgment in favor of the Church was entered. The City was permanently enjoined from enforcing its ordinance insofar as the Ingathering program was concerned.

The ordinance undertakes to define the areas in which churches are exempt. These include solicitations by religious groups solely for "evangelical, missionary or religious but not secular purposes." The ordinance also defines the term secular as "not spiritual or ecclesiastical, but rather relating to affairs of the present world, such

as providing food, clothing, and counseling." The City's determination was that the ordinance applied to the Church since it was soliciting funds for "secular" rather than for purely "religious or evangelical" purposes.

Compliance with the ordinance requires the payment of a $25.00 fee plus the filing of an application for a permit which calls for information as to the identity and address of the organization and its national and local officers, its purpose, the method of solicitation and the purposes for which funds are solicited. Also required is the time period during which solicitation will be pursued. In addition there must be furnished a financial statement.[2]

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[2] Section 8. *Application for a Permit - Filing - Content - Requirements.* An application for a permit for a charitable organization shall be filed as prescribed by rules and regulations which the Board may adopt and shall contain the following documents and information:

A. The name of the charitable organization and the name under which it intends to solicit contributions.

B. The names and addresses of its national and local directors, trustees, and officers and local key persons.

C. The location of the organization's financial records.

D. Methods by which solicitation will be made, including a statement as to whether such solicitation is to be conducted by voluntary unpaid solicitors, by paid solicitors, or both, and a narrative description of the promotional plan together with copies of all advertising material which has been prepared for public distribution by any means of communication and any location of any telephone solicitation facilities; solicitation by means of coin boxes or receptacles must be expressly authorized by the Board.

E. The names and address of any professional fund raisers who are acting or who have agreed to act on behalf of the charitable organization together with a statement setting forth the terms of the arrangements for compensation to be paid the professional fund raisers.

The district court determined that the ordinance as applied to the Church was invalid in that it employed a religious test in the exemption in Sec. 3 (a) of the ordinance for "evangelical missionary or religious but not secular purposes". A decision as to whether a cause was religious or secular was deemed to be a religious test.

Such a determination is contrary to the first and fourteenth amendments. The decision of the Supreme Court in Cantwell v. Connecticut, 310 U.S. 296 (1943) was deemed

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2. (cont'd.)

F. The general purpose for which the charitable organization is organized.

G. Where and when the organization was legally established, the form of its organization, and its federal tax exempt status.

H. The purposes for which the contributions to be solicited will be used, the total amount of funds proposed to be raised thereby, and the use or disposition to be made of any receipts therefrom.

I. The period of time during which the solicitation will be made.

J. A financial statement of any funds collected for charitable purposes by the applicant for the preceding fiscal year. Such statement shall set forth the amount of money raised and the cost of solicitations and final distribution of the balance by major category. The financial statement shall be submitted on a uniform reporting form provided by the Board.

K. Whether the organization is authorized by any other governmental authority to solicit contributions and whether it is or has ever been enjoined by any court from soliciting contributions.

L. Such other information as may be reasonably required by the Board shall be in the public interest provided that disclosure of names of donors or amounts of contributions shall not be required.

If there is any change, while any application is pending in fact, policy, or method that would alter the information given in the application, the applicant shall notify the Board in writing thereof within five days, excluding Saturdays, Sunday, and legal holidays after such change.

by the trial court to be controlling. In *Cantwell* the Supreme Court held that the application of a statute which prohibited solicitations not found to be for religious causes was invalid. The statute in Cantwell prohibited solicitations

> "for any alleged religious . . . cause, from other than a member of the organization for whose benefit such person is soliciting . . . unless such cause shall have been approved by the secretary of the public welfare council. Upon application . . . in behalf of such cause, the secretary shall determine whether such cause is a religious one . . . and, if he shall so find, shall approve the same and issue . . . a certificate. . . .

310 U.S. at 301.

As we have previously noted the first amendment declares that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." This provision is applicable to the states through the fourteenth amendment. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

Cantwell is applicable to the present facts because the officials there were called upon, as in the present case, to ascertain and determine whether the proposed solicitations were for religious purposes. If the application failed the test there was no certification and no solicitations could legally take place. The Supreme Court held that the statute constituted a prior restraint on the free exercise of religion. It was said:

> The general regulation, in the public interest, of solicitation which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose.

> Such regulation would not constitute a prohibited previous restraint on the free exercise of religion or interpose an inadmissible obstacle to its exercise.
>
> It will be noted, however, that the Act requires an application to the Secretary of the Public Welfare Council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the first amendment and included in the liberty which is within the protection of the fourteenth.

310 U.S. at 305.

Albuquerque seeks to distinguish *Cantwell* on the ground that the consequences of the religious/secular distinction in its ordinance does not result in a prohibition of the right to solicit but rather results only in regulation in the interest of preventing fraud. It is argued that if the solicitation is determined to be secular rather than religious it is merely necessary to apply for a permit (and be subject to the scrutiny of an official). No blanket prohibition is involved.

It is argued in addition that the present ordinance does not, as in *Cantwell*, allow an administrative official to make decisions as to whether a religious cause conformed to "reasonable standards of efficiency." It is said that this granted overbroad discretion, a condition which is not

here present. The ordinance which we consider is said to not require a determination as to what is religious, for the purpose of censoring the activity, but merely for imposing reasonable regulations for preventing fraud and other similar conduct. But *Cantwell* found that an administrative determination as to what was religion or religious was objectionable.

The foregoing overlooks the fact that this is a very sensitive area. The setting up of a city agency to make distinctions as to that which is religious and that which is secular so as to subject the latter to regulation is necessarily a suspect effort. It may be that applied to an organization which can be shown to commit atrocities in the name of religion or with a religious cloak would present a different problem. We do not, however, have this condition here. The conception of religion entertained by the City in this very case was that it had to be purely spiritual or evangelical. Thus, the charitable activity of the church having to do with the feeding of the hungry or the offer of clothing and shelter to the poor was deemed to be subject to regulation. This broad definition of secular is part of the problem. Whether a less vigorous *construction* would result in a different conclusion is not, of course, before us and is not a proper subject for us to consider. Inasmuch, however that the challenge is to the ordinance *as applied* we must conclude that the present effort is an invalid interference.

The drafters of the ordinance sought to accomodate [sic] free exercise by exempting evangelical, missionary or religious but not secular causes. Such an effort is a difficult one because of the continuing necessity for making judgments as to what is or is not religious. Thus, although the ordin-

ance does not express any anti-religious effort or object, it is objectionable because it involves municipal officials in the definition of what is religious.

For this court to condemn all regulation of religious solicitation in broad terms would be out of harmony with the decided cases. The City retains its secular mission which is to protect its citizenry from fraudulent or overreaching solicitations. The opinion of the Supreme Court in Hynes v. Mayor of Oradell, 425 U.S. 610, 619 (1976) recognizes this. Its teaching is to be gleaned from the following statement:

> "A narrowly drawn ordinance, that does not vest in municipal officials the undefined power to determine what message residents will hear, may serve these important interests without running afoul of the First Amendment."

See also Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 100 S.Ct. 826 (1980); Breard v. Alexandria, 341 U.S. 622 (1951); Thomas v. Collins, 323 U.S. 516 (1945); Martin v. Struthers, 319 U.S. 141 (1943).

It is well to review this further admonition contained in the *Cantwell* opinion. The Court said:

> Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.

310 U.S. at 306.

Regulations, however, which restrict the exercise of first amendment rights by requiring prior approval are going to be suspect, and will face an unfavorable presumption in regard to constitutional validity. Bantam Books v. Sullivan, 372 U.S. 58 (1963). Any standard set forth must be "susceptible of objective measurement," Keyishian v. Board of Regents, 385 U.S. 589, 603-604 (1967), and "precision of regulation must be the touchstone." NAACP v. Button, 371 U.S. 415, 438 (1963). Sufficient procedural safeguards must be present. See Freedman v. Maryland, 380 U.S. 51 (1965). Regulation which burdens the free exercise of religion and poses a threat of entanglement between the affairs of Church and State must be justified by a compelling state interest, Sherbert v. Verner, 374 U.S. 398 (1963), and there must not exist less restrictive and entangling alternatives. Waltz v. Tax Commission, [sic] 397 U.S. 664 (1970). There are some recent decisions which have considered the validity of solicitation ordinances in light of these constitutional standards. *See* International Society for Krishna Counsciousness [sic] v. Rochford, 585 F.2d 263 (7th Cir. 1978); Fernades v. Limmer, 465 F.Supp. 493 (N.D. Tex. 1979); Cherris v. Amundson, 460 F.Supp. 326 (E.D. La. 1978); Swearson v. Meyers, 455 F.Supp. 88 (D. Kan. 1978); International Society for Krishna Consciousness v. Griffin, 437 F.Supp. 666 (W.D. Pa. 1977).

Judge Bratton's opinion in the district court reached the conclusion which we have come to and we do not disagree with any of the reasoning which was employed by him.

The judgment of the district court is affirmed.

No. 79-1477 - JOSEPH ESPINOSA, et al. v. DAVID RUSK, et al. BARRETT, Circuit Judge, dissenting:

I respectfully dissent.

The conscientious District Court grappled with the difficult factual problem presented in this case in reaching the legal conclusion, affirmed by the majority opinion, which has firm rooting in constitutional law. The particular problem relates to the definition of "religious" and "secular" activities and the interrelationship one to another. This, in turn, is bound up in one of the most trying and vexing tasks found in constitutional law — that of defining "religion" for purposes of First Amendment rights.

In the consideration of whether the "secular" law constitutes an impermissible burden on the free exercise of "religion" the State must show a compelling reason to enforce its law. This is difficult because the crux of many decisions seems to not only recognize the right of the individual to *define* his *own* religion and to exercise his *individual* beliefs therein free of government restraint or compulsion, but he is further protected in *acting upon* those beliefs even in the face of non-discriminatory secular enactments. The burden was traditionally on the person contending that his religious activity would not interfere with a recognized state interest. That burden, however, has shifted. Today it is the obligation of the state to show that both the religious belief and practice will endanger a state interest and that the restraining action imposed cannot be supplanted by any reasonable alternative. *United States v. Seeger*, 380 U.S. 163 (1965); *Sherbert v. Verner*, 374 U.S. 398 (1963). No advantage can accrue to orthodox religious beliefs under the religious

belief test announced in *United States v. Seeger, supra.* The breadth of the new test finds room for "religious" beliefs protected by the Free Exercise Clause relating to topics such as the use of drugs in religious exercise, refusal to work on Sabbaths, opposition to all war and blood transfusions.

In my view, the very breadth of the "religious" definition so recognized requires a *common sense* approach to the so-called "secular" entanglement therein. It is illogical, in my view, to simply prohibit the enforcement of a state law designed to protect the citizens from fraudulent solicitations in all cases where the "religious" cult, sect or organization proclaims that practices which have been historically secular in these United States, i.e., government aid to the poor, to the sick and the homeless, are, for statutory exemption purposes, "religious" activities because of the announced beliefs.

I believe that the accommodation between church and state so often recognized in the realm of the prohibition against the establishment of religion proclaimed in the First Amendment — the Establishment Clause — can and should be logically applied in cases such as that presented here involving the Free Exercise Clause. The Supreme Court has consistently recognized that a certain amount of church-state entanglement will exist. *Abington School Dist. v. Schempp,* 374 U.S. 203, 212 (1963); *Engel v. Vitale,* 370 U.S. 421, 434 (1962). In the context of those decisions, the critical issue was not whether there exists some entanglement but rather whether the entanglement is excessive and thus violative of the Establishment Clause.

Just as the Supreme Court has recognized that the

line of separation of church and state required under the Establishment Clause is neither straight nor easily determined, *Committee for Public Education & Religious Liberty v. Regan*, 48 U.S.L.W. 4168 (Feb. 20, 1980), and that the First Amendment does not forbid all mention of religion in public schools, but rather that religion be neither advanced or inhibited, *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), I would impose similar criteria to the case at bar and pose this inquiry: Does the Albuquerque ordinance challenged here impose an *undue, excessive restraint* upon the Seventh Day Adventist Church's religious activity [its annual solicitation drive in Albuquerque] by requiring a prior application for permit to solicit for funds intended for "secular activities"? I would answer the inquiry in the negative. In my view, then, the ordinance passes constitutional muster. I believe this to be so because the City's determination that the solicitation of funds for medical, food, clothing and shelter *are secular* is common-sensed and rational. It does not impose an impermissible religious test violative of the mandate of *Cantwell v. Connecticut*, 310 U.S. 296 (1940). That case involved solicitations of funds going directly to the heart of religion. A distinction must be drawn, however, between those activities characteristic of secular life, historically of primary and compelling concern of the community and government, which are also pursued by religious organizations. Thus, I would sustain the Albuquerque ordinance, insofar as it pertains to those activities overwhelmingly secular in nature, in keeping with the City's compelling interest in preventing fraud. The burden cast upon a religious organization in meeting the requirements of the licensing ordinance is *de minimus* in relation to the City's com-

pelling interest in preventing fraudulent solicitations of its residents.

FILED: United States Court of Appeals, Tenth Circuit, Oct. 21, 1980. Howard K. Phillips, Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSEPH ESPINOSA, CHARLES SHOBE,
MORTON L. DUNKIN, and the
GENERAL CONFERENCE CORPORATION
OF SEVENTH-DAY ADVENTISTS,
Plaintiffs,

vs. CIV 78-915-B

DAVID RUSK, Mayor; PATRICK BACA,
JOE R. ABEYTA, MEL ARAGON,
THOMAS W. HOOVER, SANDRA L. WEST,
ALAN B. REED, JO McALEESE,
JIM DELLENEY, MARION M. COTTRELL,
members of the City Council of
the city of Albuquerque, New Mexico;
and BOB V. STOVER, Chief of Police
of the city of Albuquerque, New Mexico,
Defendants.

MEMORANDUM OPINION

This matter comes on for consideration upon the Motion of the plaintiffs who are members of the Seventh-Day Adventist Church, and the church organization itself, for a preliminary and permanent injunction prohibiting the defendants, including the Mayor of the City of Albuquerque and the members of the Albuquerque City Council, from enforcing the Albuquerque city ordinance relating to charitable solicitations against them on the grounds that such enforcement violates the First and Fourteenth Amendments to the United States Constitution. The plaintiffs have brought this suit for injunctive and declaratory relief pursuant to 42 U.S.C. § 1983, and jurisdiction is based on 28 U.S.C. § 1343(3).

The Court having considered the argument presented at the hearing in this matter, as well as the memoranda filed, it is concluded the Motion of the plaintiffs is well taken.

The parties in this case have stipulated to the pertinent facts surrounding their dispute. As noted, all the plaintiffs with the exception of the church organization itself, are individual members of the Seventy [sic] -day Adventist Church, and in various roles are actively engaged in the Church's Ingathering Program. The Ingathering Program is an official international religious program of the church involving literature distribution and the solicitation and collection of funds, which money is spent to provide food, clothing, shelter, health services, education, and other community services. This program is considered by the members of the religion an essential part of the evangelistic mission of the Adventist Church. The City of Albuquerque, through the City Attorney's office, has made clear that it considers the Seventh-day Adventist Church to be a "charitable organization" within the meaning of City Ordinance 72-1975. It has stated that because of the "secular" nature of the Adventists' Ingathering Program, it will require the church to obtain a permit prior to soliciting contributions. A temporary restraining order was stipulated to by the parties, and the Adventists were able to carry on their Ingathering program during the month of December without complying with the ordinance. The Order has, by agreement of the parties continued in effect pending this decision in the matter.

The city ordinance here in question, 72-1975 relates to charitable solicitations and attempts to protect the general public from fraudulent and dishonest conduct by requiring

solicitors to obtain a permit from the Albuquerque Solicitations Review Board (Board). Among the exemptions provided by the ordinance are solicitations by religious organizations if such are conducted among the members voluntarily or if such are for "evangelical, missionary, or religious but not secular purposes." *Section 10-9-3(A).* The ordinance further defines "secular" as meaning

> "not spiritual or ecclesiastical but rather relating to the affairs of the present world, such as providing food, clothing and counselling."
>
> *Section 10-9-2(L).*

If an organization is not exempt, the ordinance requires that it file an application for a permit, including such information as the name of the organization, the name under which will [sic] it will solicit, the names and addresses of its national and local directors and officers, the location of its financial records, the methods by which the solicitations will be made, the names and addresses of any professional fund raisers acting on its behalf, the purpose of the organization and where and when it was established, the purposes for which the contributions will be used, the time during which the solicitation will be made, a financial statement of charitable collections for the preceeding [sic] year and whether the organization is authorized by any other governmental body to solicit contributions. *Section 10-9-8.* The Board is also authorized to request "such other information as may be reasonably required by the Board . . ." *Section 10-9-8(L).*

The application is then reviewed by the Board to determine if the cost of the solicitation will exceed 30% of total gross amount to be raised, if the advertising material and promotional plan are false, misleading or deceptive and

if the organization has been convicted of a crime involving solicitations in the past 10 years. *Section 10-9-10.* If the determinations are in the negative or if 45 days pass without action, the permit is granted at the cost of $25.00 to the applicant. If the Board finds that any of the above requirements are not met, it must notify the applicant, and state the reasons for its denial of the permit. *Section 10-9-11(c).* The applicant may, within the next twenty days, petition for reconsideration and is entitled to a hearing.

The plaintiffs claim that the provision of the ordinance defining "secular" and its application to their Ingathering Program violates the First Amendment free exercise clause in that it amounts to a censorship of religion. They also challenge the exemption scheme in the ordinance which allows charitable organizations to solicit funds from its own members without a permit, as favoring large, well-established religions in violation of the First Amendment establishment and Fourteenth Amendment equal protection clauses. Finally, the plaintiffs claim that the procedures of the Board for granting or denying permit applications constitute an overbroad delegation of authority to an administrative body in violation of the procedural due process requirements of the Fourteenth Amendment.

Before proceeding to the merits, it should be noted that there are no prosecutions for violation of the city ordinance currently pending and thus the abstention doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971) does not preclude the Court's consideration of this matter. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Steffel v. Thompson*, 415 U.S. 452 (1974).

The first claim of the plaintiffs, that the city ordinance violates the Free Exercise Clause of the First Amendment, and the Fourteenth Amendment is based on the definition of "secular" in the ordinance. It is plaintiffs' contention that the city has improperly undertaken to limit and define what is religion and what is not. Specifically, the plaintiffs claim that the Ingathering Program of the Seventh-day Adventist Church which has, as one of its aims, the providing of food, shelter and clothing is an essential part of their religious mission, and yet, under the city ordinance it is defined as secular. The consequence of this for the plaintiffs is that they cannot take advantage of the religious solicitation exemptions in the statute, and must therefore apply and pay for a permit.

The City argues that it has a valid interest in regulating the solicitation of funds for what it defines as secular purposes. It further argues that the fact that this valid regulatory interest at times impinges on the activities of religious groups does not make it improper. According to the city, the effective regulation of charitable solicitations requires the distinctions in the ordinance.

In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Supreme Court struck down as unconstitutional as applied a Connecticut statute which prohibited solicitations

> "... for any alleged religious ... cause, from other than a member of the organization for whose benefit such person is soliciting ... unless such cause shall have been approved by the secretary of the public welfare council. Upon application ... in behalf of such cause, the secretary shall determine whether such cause is a religious one ... and, if he shall so find, shall approve the same and issue ... a certificate ..." 310 U.S. at 301.

Several Jehovah's Witnesses had been arrested and convicted for soliciting funds and distributing literature without the prior approval of the secretary of the public welfare council, as required by the statute. They had defended on the grounds that the statute was unconstitutional. In reversing the judgments of conviction, the Court found that

> ". . . to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." 310 U.S. at 307.

The Court did however approve some state regulation of solicitation by religious groups. It found nothing constitutionally offensive in requiring a solicitor to "establish his identity and authority to act for the cause he purports to represent." 310 U.S. at 306. Nor is the state prohibited from regulating the "time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience." *Ibid.* The Court observed that "general regulation . . . which does not involve any religious test . . . is not open to any constitutional objection . . ." 310 U.S. at 305.

The City argues that *Cantwell, supra* is distinguishable on the grounds that the city ordinance does not leave to any administrative officer or body the authority to decide what is a bona fide religious cause. This is true, but it is not a relevant difference. It does not alter the posture of the ordinance with regard to the First Amendment to set out specifically in it what in *Cantwell, supra,* was left to an administrative official. By defining "secular," the or-

dinance specifically eliminates solicitations for particular activities from the sphere of "religious purposes," and in that way, embodies a religious test. This comes clearly within the prohibition stated in *Cantwell, supra.*

In support of the ordinance the city relies upon *Gospel Army v. City of Los Angeles*, 163 P.2d 704 (Calif., 1945), in which the California Supreme Court, in a 4-3 decision, upheld the constitutionality of an ordinance similar to that being considered here. The majority opinion found that solicitation for charitable purposes was a proper area of concern for the city of Los Angeles and that the religious motivation of some solicitors did not exempt that group from the ordinance requirements. It distinguished *Cantwell, supra*, on the grounds that it did not involve solicitations for charitable purposes, but rather for the support of the religious group itself. This is correct, but it ignores the fact that some charitable solicitations are an integral part of a religious system. When such is the case there seems to be no reason to distinguish between solicitations that will directly support a religious group and those that support a separate, but still religious activity of the group, though the direct benefit is to others.

It is clear that the city could require some form of registration and identification and exact a nominal fee from the Adventists. *Murdock v. Pennsylvania*, 319 U.S. 105 (1942). And the plaintiffs have stipulated that they would voluntarily provide such information to the city. Thus, the real pitfall of the ordinance is that in effect it defines what is religious and what is not, and requires those whose activities it deems "secular" to obtain a permit prior to soliciting for funds. That kind of regulation is impermissable.

Therefore the Court finds that the city ordinance as applied, embodies a religious test in violation of the First and Fourteenth Amendments and that the City should be prohibited from enforcing the statute against the Seventh-day Adventist Ingathering Program. Having so found the Court need not consider the other constitutional challenges raised by the plaintiffs.

An order will be entered in accordance herewith.

HOWARD BRATTON
United States District Judge

FILED: United States District Court, Albuquerque, New Mexico, Mar. 22, 1979. Jesse Casaus, Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOSEPH ESPINOSA, CHARLES SHOBE, MORTON L. DUNKIN, and the GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS, Plaintiffs,	)	No. CIV 78-915-B
vs.	)	
DAVID RUSK, mayor; PARTRICK [sic] BACA, JOE R. ABEYTA, MEL ARAGON, THOMAS W. HOOVER, SANDRA L. WEST, ALAN B. REED, JO McALEESE, JIM DELLENEY, MARION M. COTTRELL, members of the City Council of the City of Albuquerque, New Mexico; and BOB V. STOVER, Chief of Police of the City of Albuquerque, New Mexico, Defendants.	)	

PERMANENT INJUNCTION

THIS MATTER having come before the Court upon the Plaintiff's Motion for a Preliminary Injunction, a Permanent Injunction, and a Declaratory Judgment, and the Court having considered the argument of counsel, the Memoranda filed, and having issued a Memorandum Opinion in the above-styled cause,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that as applied to Plaintiffs, the exemption for those religious organizations which solicit for "evangelical, missionary or religious but not secular purposes" contained in Section 10-9-3(A) of Albuquerque Ordinance

No. 72-1975, embodies a religious test in violation of the First and Fourteenth Amendments to the United States Constitution.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants shall be and are hereby permanently enjoined from enforcing said ordinance against the Seventh-Day Adventist Ingathering Appeal Program.

HOWARD BRATTON
United States District Judge

SUBMITTED BY:
JOHN WILLIAMS
Local Counsel for Plaintiffs
APPROVED AS TO FORM:
SUSAN GREEN
Attorney for Defendants

FILED: United States District Court, Albuquerque, New Mexico, Mar. 30, 1979. Jesse Casaus, Clerk. Entered on Docket Mar. 30, 1979.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEPTEMBER TERM - October 21, 1980

Before Honorable James E. Barrett, Honorable William E. Doyle, and Honorable Monroe G. McKay, Circuit Judges

JOSEPH ESPINOSA, CHARLES SHOBE, MORTON L. DUNKIN and GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS, Plaintiffs-Appellees,	)	
vs.	)	JUDGMENT
DAVID RUSK, Mayor, PATRICK BACA, JOE R. ABEYTA, MEL ARAGON, THOMAS W. HOOVER, SANDRA L. WEST, ALAN B. REED, JO McALLEESE, JIM DELLENEY, and MARION M. COTTRELL, Members of the City Council of the City of Albuquerque, New Mexico, and BOB V. STOVER, Chief of Police of the City of Albuquerque, New Mexico, Defendants-Appellants.	)	No. 79-1477 (D.C. No. 78-915-B)

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

HOWARD K. PHILLIPS,
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JOSEPH ESPINOSA, CHARLES SHOBE, MORTON L. DUNKIN, and GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS, Plaintiffs-Appellees,	)
vs.	) No. 79-1477
DAVID RUSK, Mayor; PATRICK BACA, JOE R. ABEYTA, MEL ARAGON, THOMAS W. HOOVER, SANDRA L. WEST, ALAN B. REED, JO McALEESE, JIM DELLENEY, MARION M. COTTRELL, members of the City Council of the City of Albuquerque, New Mexico; and BOB V. STOVER, Chief of Police of the City of Albuquerque, New Mexico, Defendants-Appellants.	)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that DAVID RUSK, Mayor; PATRICK BACA, JOE R. ABEYTA, MEL ARAGON, THOMAS W. HOOVER, SANDRA L. WEST, ALAN B. REED, JO McALEESE, JIM DELLENEY, MARION M. COTTRELL, members of the City Council of the City of Albuquerque, New Mexico; and BOB V. STOVER, Chief of Police of the City of Albuquerque, New Mexico, the Defendants-Appellants above named, hereby appeal to the Supreme Court of the United States from the Judgment of the United States Court of Appeals for the Tenth Circuit, affirming the judgment granting a permanent injunction, entered on October 21, 1980.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

George R. "Pat" Bryan, III
Counsel for Defendants-Appellants
City Attorney
P. O. Box 1293
Albuquerque, New Mexico 87103

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 1980, copies of this Notice of Appeal to the Supreme Court of the United States were mailed, by depositing the document in a United States mailbox, with first-class postage prepaid, addressed to Mr. John Williams, Esq., 1202 Pennsylvania, N.E., Suite D, Albuquerque, New Mexico 87103, and to Mr. Lee Boothby, Johns, Carson & Boothby, 6930 Carroll Avenue, Suite 629, Takoma Park, Maryland 20012, counsel of record for Plaintiffs-Appellees. I further certify that all parties required to be served have been served.

George R. "Pat" Bryan, III
Counsel for Defendants-Appellants

FILED: United States Court of Appeals, Tenth Circuit, December 27, 1980, Howard K. Phillips, Clerk.

ORDINANCE NO. 72-1975

REGULATING CHARITABLE SOLICITATIONS; ESTABLISHING THE ALBUQUERQUE SOLICITATIONS REVIEW BOARD; REQUIRING A CHARITABLE SOLICITATIONS PERMIT; PROVIDING PROCEDURES FOR THE ISSUING, DENYING, REVOKING AND SUSPENSION OF SUCH PERMITS; AND REPEALING ORDINANCE NO. 2133.

BE IT ORDAINED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:

Section 1. *Purpose of This Ordinance.* The purpose of this ordinance is to protect the general public and charitable organizations in the City of Albuquerque; to require public disclosure of facts relating to organizations which solicit from the public for charitable purposes; and to prevent deceptive and dishonest statements and fraudulent conduct in any solicitation for and in the name of any charitable purpose. This ordinance is not intended to control commercial activities of any organization unless such activities involve a solicitation for and in the name of a charitable purpose. Nor is this ordinance intended to regulate any organization's program activities which are separate from such a solicitation.

Section 2. *Definitions.* When used in this ordinance, unless the context otherwise requires:

A. "Board" means the Albuquerque Solicitations Review Board created by Section 5 of this ordinance, or its authorized representatives.

B. "Charitable organization" means:

1. any benevolent, philanthropic, patriotic, health, educational, social, recreational, fraternal organization, or

any other person having or purporting to have a charitable nature; and

2. which solicits or solicits and collects contributions for any charitable purpose within the City of Albuquerque. Provided, however, that it shall be a rebuttable presumption that any organization granted 501(C) (3) status by the Internal Revenue Service is a charitable organization.

C. "Contribution" means the donation, promise or grant, for consideration or otherwise, of any money or property of any kind or value in the form of a direct gift or a sale and benefit affair which is wholly or partly induced by a solicitation. Reference to dollar amounts of "contributions" or "solicitations" in this ordinance means in the case of payments or promises to pay for merchandise or rights of any description, the value of the total amount paid or promised to be paid for such merchandise or rights, and not merely that portion of the purchase price to be applied to a charitable purpose. Provided, however, that "contribution" shall not include donations of money or property or any other consideration to any political campaign on behalf of any candidate for public office or to influence the passage or defeat of a proposition submitted to a popular vote at an election. Nor shall "contribution" include any commercial activity conducted by any charitable organization unless it involves solicitation for and in the name of any charitable purpose.

D. "Compensation" means salaries, wages, fees, commissions, or any other remuneration or valuable consideration.

E. "Cost of solicitation" means and includes all costs, expenditures, debts, obligations, salaries, wages, com-

missions, fees, or other money or thing of value paid or incurred in making a solicitation for a direct gift or conducting a sale or benefit affair.

F. "Direct gift" shall mean and include an outright contribution of food, clothing, money, credit, property, financial assistance or other thing of value to be used for a charitable or religious purpose and for which the donor receives no consideration or thing of value in return.

G. "Key personnel" shall mean any officers, employees, or other personnel who are directly in charge of any of the fund raising activities of the charitable organization; and any officers or individuals maintaining custody of the organization's financial records and any officers or individuals who have custody of the contributions.

H. "Permit" means written authorization from the City of Albuquerque to conduct charitable solicitations.

I. "Person" means an individual, organization, group, association, partnership, corporation, or any combination thereof.

J. "Professional fund raiser" means any person who, for compensation, plans, conducts, or manages any drive or campaign in this City for the purpose of soliciting contributions for or on behalf of any charitable organization or charitable purpose and who is not a regular employee of that organization.

K. "Sale and benefit affair" shall mean and include, but not be limited to, athletic or sports event, bazaar, benefit, campaign, circus, contest, dance, drive, entertainment, exhibition, exposition, party, performance, picnic, sale, social gathering, theater, or variety show which the public is requested to patronize or attend, and to which

the public is requested to make a contribution for any charitable purpose connected therewith.

L. "Secular" means not spiritual or ecclesiastical but rather relating to the affairs of the present world, such as providing food, clothing and counselling.

M. "Solicitation" means any oral or written request for a contribution, including the solicitor's offer or attempt to sell any property, rights, services, or other thing, in connection with which:

1. Any appeal is made for any charitable purpose; or

2. The name of any charitable organization is used as an inducement for making the contribution or consummating the sale; or

3. Any statement is made which implies that the whole or any part of the contribution or proceeds from the sale will be applied toward any charitable purpose or donated to any charitable organization. The solicitation shall be deemed completed when made, whether or not the person making it receives any contribution or makes any sale.

Section 3. *Exemptions.* Except as otherwise specifically provided in other sections of this ordinance, this ordinance shall not apply to the following:

A. Solicitations by religious organizations which are entitled to receive a declaration of current tax exempt status from the government of the United States and their duly organized branches or chapters, if the solicitations by such organization are conducted among the members thereof by other members or clergymen thereof, voluntarily, or if the solicitations are in the form of collec-

tions or contributions at the regular or special religious assemblies, meetings, or services of any such organization, or solicitations by such organizations solely for evangelical, missionary, or religious but not secular purposes.

B. Any organization which is organized and operated principally for charitable or religious or educational purposes, other than the raising of funds, when the solicitation of contributions is confined to the membership of the organization and when the solicitation is managed and conducted solely by officers and members of such organizations who are unpaid for such services.

The term "membership" shall not include those persons who are granted membership upon making a contribution as the result of a solicitation; and

C. Any charitable organization which solicits and collects contributions of no more than one thousand dollars in any one year period if all its fund raising functions are carried on by persons who are unpaid for their services.

D. Any solicitation conducted in writing by a national organization across interstate boundaries.

E. Solicitations by governmental or political subdivisions of the State of New Mexico and of the United States, if such solicitations are conducted solely in furtherance of the governmental purposes for which the governmental or political subdivision was created; provided that organizations connected with a governmental or political subdivision, but independently organized, shall not be exempt from the provisions of this ordinance.

F. Solicitations by or on behalf of schools, colleges or universities which solicitations are confined to alumni of the institution, their parents, or prior contributors to

the institution, whether or not such persons are members of any alumni association, or other organization, provided that persons conducting such solicitations are not compensated in connection with such solicitations with the exception of persons regularly employed by the institution.

G. Solicitations by or on behalf of communitywide religious or ethnic associations for charitable purposes, which solicitations are confined to members of the religious or ethnic group from which the association is formed, or prior contributors to the association, whether or not such persons are members of any association, provided that persons conducting such solicitations are not compensated in connection with such solicitations with the exception of persons regularly employed by the association.

Section 4. *Organization Ceasing to be Exempt.* Whenever any charitable organization intends to conduct or is conducting a charitable solicitation and ceases to be exempt under the provisions of Section 3, the organization shall obtain a permit as required under Section 7, within thirty days after the date it ceases to be exempt.

Section 5. *Solicitations Review Board.* The Albuquerque Solicitations Review Board is hereby established, and shall be composed of nine members, who shall be appointed by the Mayor with the advice and consent of the Council. No more than three of the members appointed to the Board shall be serving in any supervisory, advisory or policy-making capacity or as an employee of any charitable organization. One of the members of the Board shall be appointed Chairman by the Mayor to serve a one-year term. The President of the Better Business Bureau may be appointed as an ex-officio member without a vote. Of the initial appointments, three members shall be appointed to

terms ending January 1, 1977, three members shall be appointed to terms ending January 1, 1978, and three members shall be appointed to terms ending January 1, 1979; thereafter, the terms of all members shall be three years. Members shall serve without compensation. Upon request, the Mayor shall provide such staff assistance as is feasible to implement the requirements of this ordinance.

Section 6. *Powers and Duties of the Board.* The Board shall be granted the following powers and duties:

A. Adopt all rules and regulations necessary for the implementation of this ordinance.

B. Authorize, deny and suspend permits;

C. Make necessary investigations;

D. Request any information necessary for such investigations;

E. Establish and maintain a register of charitable organizations which have obtained permits;

F. Prepare an annual report, which shall be available to the public at a reasonable cost, listing all information relevant to the conduct of charitable solicitations during the preceding year in the City of Albuquerque, including organization names, amounts received during the fiscal year, and disbursements of collections by major category;

G. Determine whether or not an organization is exempt from the provisions of this ordinance and interpret upon request any provision of this ordinance.

Section 7. *Permit Required.* Except as otherwise provided in this ordinance no person may solicit contributions

on behalf of any charitable organization from persons in this City by any means whatsoever prior to the time the charitable organization has obtained a permit in accordance with this ordinance. No permit is required until March 1, 1976.

Section 8. *Application for a Permit - Filing - Contests - Requirements.* An application for a permit for a charitable organization shall be filed as prescribed by rules and regulations which the Board may adopt and shall contain the following documents and information:

A. The name of the charitable organization and the name under which it intends to solicit contributions;

B. The names and addresses of its national and local directors, trustees, and officers and local key personnel.

C. The location of the organization's financial records.

D. Methods by which solicitation will be made, including a statement as to whether such solicitation is to be conducted by voluntary unpaid solicitors, by paid solicitors, or both, and a narrative description of the promotional plan together with copies of all advertising material which has been prepared for public distribution by any means of communication and any location of any telephone solicitation facilities; solicitation by means of coin boxes or receptacles must be expressly authorized by the Board;

E. The names and addresses of any professional fund raisers who are acting or who have agreed to act on behalf of the charitable organization together with a statement setting forth the terms of the arrangements for compensation to be paid the professional fund raisers;

F. The general purpose for which the charitable organization is organized;

G. Where and when the organization was legally established, the form of its organization, and its federal tax exempt status;

H. The purpose for which the contributions to be solicited will be used, the total amount of funds proposed to be raised thereby, and the use or disposition to be made of any receipts therefrom;

I. The period of time during which the solicitation will be made;

J. A financial statement of any funds collected for charitable purposes by the applicant for the preceding fiscal year. Such statement shall set forth the amount of money raised and the cost of solicitations and final distribution of the balance by major category. The financial statement shall be submitted on a uniform reporting form provided by the Board;

K. Whether the organization is authorized by any other governmental authority to solicit contributions and whether it is or has ever been enjoined by any court from soliciting contributions;

L. Such other information as may be reasonably required by the Board shall be in the public interest; provided that disclosure of names of donors or amounts of contributions shall not be required.

If there is any change, while any application is pending, in fact, policy, or method that would alter the information given in the application, the applicant shall notify the Board in writing thereof within five days, excluding Saturdays, Sundays, and legal holidays after such change.

Section 9. *Application - Signing.* The application, and

any other documents prescribed by the Board, shall be signed under oath of the president of the charitable organization, or his legal designee.

Section 10. *Examination by Board - Limitations on Costs of Solicitations - Other Requirements.* Upon receipt of an application, the Board shall immediately initiate an examination to determine that:

A. The cost of the solicitation for direct gifts shall not exceed thirty percent of the total gross amount to be raised, or for sale and benefit affairs shall not exceed seventy percent of the total gross amount to be raised; and of this seventy percent, not more than thirty percent of the total gross amount shall be paid for all compensation paid or to be paid to all key personnel, salesmen, solicitors, collectors, and professional fund raisers. If it appears that the cost of soliciting will exceed the percentage listed above, and except for that the permit would otherwise be granted, the Board may grant a permit to the charitable organization, upon a showing that special reasons make a cost higher than thirty percent or seventy percent, or thirty percent, respectively, reasonable in the particular case. When such a permit is issued, the amount, stated as a percentage of the total purchase price, that will be given to the charitable organization shall be disclosed to each person being solicited at the time of each solicitation.

B. The advertising material and the general promotional plan are not false, misleading, or deceptive.

C. The charitable organization has not, or if a corporation, its officers, directors, and principals have not, been convicted of a crime involving solicitations for or on behalf of a charitable organization in this City, State, or the United States within the past ten years.

D. In the case of application renewals, the organization has complied with all provisions of this ordinance during the preceding calendar year.

Section 11. *Procedure for Authorization or Denial of a Permit.*

A. Within 45 days of receipt of the application for a permit, the Board shall grant or deny the permit. If the Board neither grants nor denies the permit within 45 days of receipt of the application, the permit shall be deemed granted, unless the applicant has consented in writing to a delay.

B. If the Board affirmatively determines, upon inquiry and examination that the requirements have been met, it shall grant the permit.

C. If the Board determines, upon inquiry and examination, that any of the requirements have not been met, the Board shall notify the applicant that the application for the permit must be corrected with respect to the deficiencies specified. If the requested corrections are not made, the Board shall deny the permit, such denial shall include the findings of fact upon which the denial is based. The denial shall not become effective for twenty days during which time the applicant may petition for reconsideration and shall be entitled to a hearing.

Section 12. *Permit Fee - Duration - Renewal.* If the application is approved by the Board, the applicant shall pay the Treasurer of the City of Albuquerque the permit fee of twenty-five dollars ($25.00) for any new application under this ordinance and ten dollars ($10.00) for each renewal thereafter. The permit shall be effective for the period determined by the Board, but such period shall not

exceed one year. The Board shall adopt regulations providing for the annual renewal of the permit by charitable organizations having continuing or annually recurring fund raising campaigns. Renewals shall be accompanied by such information as may be required to bring the application statement up to date.

Section 13. *Notice of Intention to Solicit.*

Any charitable organization mentioned under Section 3-C before conducting any solicitation shall give written notice to the Board stating its intention to solicit funds, the basis of its exemption, the purpose of such solicitation, the approximate percentage of collections, after deductions for expenses, to be actually devoted to that purpose, and when such solicitation will be conducted. Written notice shall be given to the Board by the organization, or by someone on its behalf, at least five days in advance of such solicitation. Upon receipt of such written notice, the Board shall issue a form which acknowledges that the organization has complied with the requirements of this Section.

Section 14. *Subsidiary Organizations to be Covered by Permit.* Where any chapter, branch, or affiliate of a charitable organization is supervised and controlled by a superior organization which is incorporated or legally qualified or licensed in New Mexico to do business, or which is doing business within the City of Albuquerque, such chapter, branch, or affiliate shall not be required to obtain a permit as required in Section 7 of this ordinance if the superior or parent organization files an application on behalf of its subsidiary, in addition to or as a part of its own application. Where a subsidiary organization is covered by the permit of its superior organization, the

superior organization shall file any information required of the subsidiary organization in addition to or as a part of its own information.

Section 15. *Application to be Kept Current - Amendments.* A permit granted by the Board to a charitable organization, under the provisions of this ordinance, shall be kept current during its effective term by the charitable organization. Such current status shall be maintained by filing amendments with the Board, in the form prescribed by it, within ten days after any material change in the information previously furnished to the Board. The following changes shall be construed as material for the purposes of this section:

A. Any change in the name of the organization.

B. Any addition or substitution in the names of the salaried or otherwise compensated directors, trustees, other officers, key personnel, or professional fund raisers; or any change in the reported addresses or duties of the officers or individuals who keep the records or are in custody of the contributions.

C. Any change, amounting to five percent or more, in the remuneration to paid to any professional fund raisers.

D. Any change in the general purposes of the organization, intended use of the contributions, method of solicitation, period of time for solicitation, general areas in which such solicitation was to take place or telephone solicitation facilities.

E. Any change in other facts which are declared material by rule or regulation of the Board.

Section 16. *Permit Not Endorsement.* Permits under

this ordinance shall not be deemed to constitute endorsement, by the City of Albuquerque, of any charitable organization so registered and no person or charitable organization shall intentionally claim or infer, directly or indirectly any such endorsement by reason of its permit. This permit does not constitute a waiver of any requirement or provision contained in any ordinance of the City of Albuquerque or state or federal law.

Section 17. *Application and Information Public Records.* The application and all information documents, and reports filed with the Board under this ordinance are matters of public record and shall be, subject to reasonable regulation, open to public inspection. The names of donors and amounts of their contributions shall not be required.

Section 18. *Identification Card.* Every person who solicits contributions on a face-to-face basis for or on behalf of a charitable organization which is required to obtain a permit under this ordinance, shall have visible for prospective contributors an identification card to be provided by the City of Albuquerque which shall include the following information in legible form.

A. The name of the charitable organization for which the contributions are solicited;

B. The name of the person soliciting contributions;

C. The permit number and the dates such permit is valid;

D. Such other information, from the application statement, as may be required by reasonable rule or regulation of the Board for the protection of the public. The Board shall prescribe the form of such identification card.

The card shall be exhibited to any person from whom a contribution is requisted or, on demand, to any police or law enforcement officer.

Section 19. *Posted Property.* Except where he has been requested or invited to do so by the owner or occupant of such property, it is unlawful for any person to solicit, to commit an act of solicitation in or upon any premises if required by anyone not to do so, or if there is placed on such premises in a conspicuous place near the entrance thereof a sign bearing the words: "No Trespassing," "No Peddlers," "No Agents," "No Solicitors," "No Advertisements" or any similar notice indicating in any manner that the occupants of said premises do not desire to be molested or have their right of privacy disturbed.

Section 20. *Manner of Conducting Paid Telephone Solicitations.* Telephone solicitations by paid telephone solicitors shall not be conducted on Saturdays, Sundays or holidays or during the hours of 8 p.m. to 9 a.m. on any day of the week. Paid telephone solicitors shall be required to give the person solicited the following information:

A. The solicitor must state that he is a paid telephone solicitor.

B. The solicitor must give his name, the name of the organization by which he is employed and the charitable purpose for which the solicitation will be used.

Section 21. *Books, Records and Contracts.* Upon request by the Board, the charitable organization shall make available for inspection by the Board all books, records, and contracts relating to charitable solicitations, at any reasonable time before the application is granted, or dur-

ing the time a permit is in effect, or within two years after a permit has expired. Books, records, contracts, and other materials of the organization shall not be matters of public record, except as otherwise provided for by this ordinance.

Section 22. *Financial Statements - Special Reports.*

A. Within ninety days following the close of its fiscal year every charitable organization which is required to have a permit and which has received contributions during such fiscal year shall file with the Board a financial statement, containing the following information on forms provided by the Board.

1. The gross amount of the contributions pledged and the gross amount collected;

2. The amount thereof applied to charitable purposes with a statement indicating the major categories to which disbursements were made as may be required either by general rule or by specific written request of the Board;

3. The aggregate amount paid and to be paid for the costs of such solicitation;

4. The amounts paid and to be paid to professional fund raisers. Financial statements shall conform to the accounting and reporting procedures set forth in the "Audit Guides" published by the American Institute of Certified Public Accountants or shall conform to the generally accepted standards of financial accounting and reporting for the organization's particular field.

Section 23. *Violations - Suspensions and Revocation of the Permit - Hearing.*

A. If the Board determines following notice and hearing that a person has:

1. Violated any provision of this ordinance;

2. Directly or through an agent or employee engaged in any false, deceptive, or misleading advertising, promotional, or sales methods in soliciting for a charitable organization; or

3. Violated any lawful order, rule or regulation of the Board;

the Board shall immediately suspend the permit and give the permit holder written notice by registered mail of a hearing to be held within 14 working days before the Mayor to determine whether or not the permit should be revoked. This notice must contain a statement of the facts upon which the Board has acted in suspending the permit.

B. At the hearing the permit holder, and any other interested person, shall have the right to present evidence as to the alleged facts upon which the Board based the suspension of the permit and any other facts which may aid the Mayor in determining whether this ordinance has been violated. If, after such hearing, the Mayor finds that the ordinance has been violated, he shall revoke the permit and cause to be filed within five business days after the hearing, in the office of the City Clerk for public inspection, and served upon the permit holder and all interested parties participating in the hearing, a written statement of the facts upon which such finding is based. If after such hearing, the Mayor finds that the ordinance has not been violated, he shall within five business days after the hearing give to the permit holder a written statement cancelling the suspension of the permit and stating that no violation or misrepresentation was found to have been committed.

Section 24. ***Penalties.*** **Any person violating any of the provisions of this ordinance or filing, or causing to be filed, an application for a permit under this ordinance containing false or fraudulent misstatements shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $300.00, or shall be imprisoned for not more than 90 days or may be punished by both fine and imprisonment. Each day of violation shall be considered a separate offense.**

Section 25. ***Severability.*** **If any section, subsection, sentence, clause, word or phrase of this ordinance is for any reason held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The Council, the governing body of the City of Albuquerque, hereby declares that it would have passed this ordinance and each section, subsection, sentence, clause, word or phrase thereof irrespective of any one or more sections, subsections, sentences, clauses, words or phrases being declared unconstitutional or otherwise invalid.**

Section 26. ***Repealing Clause.*** **Commission Ordinance No. 2133 is hereby repealed.**

Section 27. ***Effective Date and Publication.*** **This ordinance shall become effective December 1, 1975 and shall be published in full.**

PASSED AND ADOPTED THIS 3rd day of November, 1975.

Office-Supreme Court, U.S.
FILED
FEB 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID RUSK, MAYOR, et al., *Appellants,*

v.

JOSEPH ESPINOSA, et al., *Appellees.*

On Appeal From The United States Court Of Appeals For The Tenth Circuit

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MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the Court of Appeals properly held that a city solicitation ordinance violated the Free Exercise Clause of the First Amendment when that ordinance defined certain of the Church's religious ministries as secular and required licensing of the Church's door-to-door fund-raising activities for those religious ministries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
MOTION TO AFFIRM	1
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
ARGUMENT	5
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:

Abington v. Schempp, 374 U.S. 203, 242 (1963) 13

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) .. 9, 19

Buckley v. Valeo, 424 U.S. 164 (1976) 17

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).. 14

Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). 6, 7, 8, 15

Elrod v. Burns, 427 U.S. 347, 362 (1976) 11

Founding Church of Scientology v. U.S., 409 F.2d 1162 (D.C. Cir. 1969) 14

Freedman v. Maryland, 380 U.S. 51 (1965) 19

Gibson v. Florida, 372 U.S. 539, 558 (1963) 17

Gillette v. United States, 401 U.S. 437 (1971) 14, 16

Gospel Army v. City of Los Angeles, 163 P.2d 704, 719 (1945) 15

ISKCON v. Rockford, 558 F.2d 263, 271 (7th Cir. 1978) 19

Lovell v. Griffin, 303 U.S. 444, 463 (1938) 8

Meek v. Pittenger, 421 U.S. 349 (1975) 13

Table of Authorities Continued

Page

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 7, 8

NAACP v. Alabama, 357 U.S. 449, 462 (1958) 17

NAACP v. Button, 371 U.S. 415 (1936) 17

Near v. Minnesota, 283 U.S. 697 (1931) 6

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 13

Schneider v. New Jersey, 308 U.S. 147, 160 (1939) 8

Shelton v. Tucker, 364 U.S. 479 (1960) 9, 11, 17

Sherbert v. Verner, 374 U.S. 398 (1963). 9, 10, 16, 17, 18, 19

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 9, 19

Thomas v. Collins, 323 U.S. 516, 530 (1945) 17

U.S. v. Ballard, 332 U.S. 78 (1944) 14

Valente v. Larsen (8th Cir. 1981), Nos. 80-1131, 80-1159 17

Village of Schaumburg v. Citizens for a Better Environment, 100 S.Ct. 826, 833-34 (1980) 8, 11

Wisconsin v. Yoder, 406 U.S. 205 (1972) 10, 14

CONSTITUTIONAL PROVISIONS:

First Amendment, United States Constitution 2, 5, 6, 8, 9, 10, 11, 12

Fourteenth Amendment, United States Constitution .. 2

ORDINANCES:

Albuquerque Ordinance No. 72-1975 ..... 2, 5

MISCELLANEOUS:

American Constitutional Law, 855 (1978) L. Tribe ... 10

The Antiquities of the Christian Church, Book 8, Ch. 7, § 12 (1856) J. Bingham 13

Holy Bible 11

No. 80-1207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAVID RUSK, MAYOR, et al., *Appellants,*

v.

JOSEPH ESPINOSA, et al., *Appellees.*

On Appeal From The United States Court Of Appeals For The Tenth Circuit

MOTION TO AFFIRM

Appellees, Joseph Espinosa, Charles Shobe, Morton L. Dunkin and the General Conference of Seventh-day Adventists, pursuant to Rule 16 of the Rules of the Supreme Court of the United States move that the final judgment and decree [1] of the United States Court

[1] Opinions Below: The opinion of the Court of Appeals appears in the Appendix to the Appellants' Jurisdictional Statement. It has not been reported.

The Memorandum opinion of the United States District Court for the District of New Mexico also appears in Apellants' Appendix and, similarly, is not reported.

of Appeals for the Tenth Circuit be affirmed on the ground that the judgments below were correct and the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument. Appellees believe that the decisions of the Court of Appeals and the District Court below correctly applied the long-standing rulings and teachings of this Court, thus making further argument unnecessary.

STATEMENT OF THE CASE

I. Nature of the Case

The Seventh-day Adventist Church (Church) and certain of its members brought this civil action to enjoin enforcement of the Albuquerque, New Mexico (City) municipal Ordinance 72-1975. The Church believes that this solicitation Ordinance, if enforced against its religious programs, would result in a denial of fundamental rights guaranteed by the religion clauses of the First Amendment to the United States Constitution, as made applicable to the States and its political subdivisions by the Fourteenth Amendment.

II. Course of the Proceedings

On December 12, 1978, the Church, a worldwide religious organization, filed a Complaint, and a Motion for a Temporary Restraining Order, seeking declaratory and injunctive relief against enforcement of the Ordinance. The Church acted to prevent the deprivation of those rights guaranteed by the First Amendment of the United States Constitution. On December 18, 1978, the Federal District Court approved a joint Stipulation Granting a Temporary Restraining Order, thus permitting the Church to carry out its annual Ingathering

program (described hereinafter and the subject of this litigation). The City's Answer was received on January 3, 1979.

Facts before the District Court were contained in a Stipulation of Facts [2] Briefs, and legal memorandums were filed. The Court received oral argument on January 26, 1979.

Reaching a decision on the merits, the trial court on March 22, 1979, permanently enjoined the City from enforcing its Ordinance against the Church's Ingathering program.

The City appealed the District Court decision to the Court of Appeals for the Tenth Circuit, which affirmed the judgment.

III. Statement of the Relevant Facts

The church program conducts an annual door-to-door solicitation in Albuquerque and throughout most of the world. This program is known as Ingathering, and attempts to reach every home with a spiritual message. The Church views mankind as being a physical, mental and spiritual entity. And, to meet such needs, "... these Christian people feel they must minister not just to one, but to all aspects of his being. Thus, the humanitarian work fostered by the Adventists . . . comprehends a healing ministry for the sick, the feeding of the hungry, the clothing of the naked, the education of children and youth." (See Stip. Fact 6.) The Church considers this activity a form of evangelism,

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[2] Reference to this Stipulation in this Brief will be abbreviated as follows: (Stip. Fact No. —).

including the solicitation of contributions to support the Church's programs. Each home contacted by individual Church members is offered Bible course enrollments.

The money received by the Church supports various medical, community services, educational, and evangelical activities. The Church also provides food, clothing, shelter and money for the needy; summer camps for disadvantaged youths; counseling, health services, and educational programs with the funds solicited during its yearly Ingathering program. (Stip. Fact 8.)

During the Fall of 1978, in preparing their annual campaign of Ingathering in Albuquerque, the Church contacted the City Attorney's office to determine whether the Ordinance would apply to these religious activities. Attorneys for the City of Albuquerque advised the Church that the ordinance did in fact apply. The Church, while willing to register with the City, refused to apply for and obtain a permit as required by the Ordinance (Amended Stip. Facts, p. 1). The City under the Ordinance determined the Church's Ingathering program and activities funded thereby to be secular. (See Stip. Fact 5 and 8.)

The Church has consistently maintained that its Ingathering program and the welfare ministries funded thereby are a part of its religious mission and constitute a part of its biblical duty. (Stip. Fact 12.) The action of the City through its Ordinance has a chilling effect on the ministry of the Church and subsequently interferes with the program of the Church and its members in their door-to-door evangelistic contact with the citizens of Albuquerque (Stip. Fact 13.).

ARGUMENT

The facts of this case were presented to the Court by stipulation.[3] This has eliminated many of the problems often faced by a trial court in making its determination of the sensitive constitutional questions raised when provisions of a legislative act affect rights guaranteed under the religion clauses of the First Amendment to the United States Constitution. The Church maintains that any factual issues which might have been present were thus eliminated by the stipulation of facts entered into.

The city claims that the door-to-door evangelistic outreach of the Seventh-day Adventist Church was subject to its solicitation ordinance (Stip. Fact 4). The city contends that this church program was not exempt because the Church's activities did not meet the cities definition of religion.

There is no question that the city ordinance as applied to the Seventh-day Adventist door-to-door evangelistic outreach program is a prior restraint of that Church's activities and that of its members because: (a) under Section 7 [4] of the ordinance all solicitation is forbidden until a permit has been issued by the city solicitation review board unless the activity comes within one of the poorly-defined exceptions; (b) the board under Section 11(A) of the city ordinance can delay the granting or denying of a permit for up to 45 days. Thereafter under Section 11(C) of the ordinance an applicant denied a permit has 20 days during which to

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[3] The Stipulations appear in the Appendix, hereto, p. 1a, infra.

[4] The Albuquerque City Ordinance, No. 72-1975 here at issue is set out in the Appellants' Jurisdictional Statement, Appendix, pp. 28a-45a.

file a petition for reconsideration. This subsection states that the applicant is then entitled to a hearing but no provision of the ordinance indicates when that hearing must be held, thus further delaying for some undetermined time the ultimate decision concerning the granting or denying of a permit; (c) Under section 6(D) the board has the open-ended authority to "request any information necessary for its investigation;" (d) Under section 5(B) the city solicitation review board has apparent unbridled discretion to authorize or deny an application for a permit; (e) Under Section 11(C), if the board in its wisdom but without any legislative guidance decides to deny such permit application, the only redress afforded the applicant is to petition for reconsideration with a required hearing. It is not clear, however, what happens after the hearing.

The above provisions do not comport with this Court's decision in *Cantwell* v. *Connecticut,* 310 U.S. 296, 305 (1940), which teaches that solicitation statutes must not "unreasonably obstruct or delay the collection of funds." Here we have a classic example of a prior restraint of a constitutionally protected right.

Cantwell, id. at 305, found that the vesting of power in a licensing officer to decide if an activity is a religious one constitutes a censorship of religion which, is a denial of liberty protected by the First Amendment. As such, this form of licensing is an unconstitutional prior restraint. See *Near* v. *Minnesota,* 283 U.S. 697 (1931).

The Court in *Cantwell* did conclude however that its decision striking down a state solicitation statute in no way prevented a state from protecting its citizens against fraud by penal laws through the use of a

limited identification requirements. See 310 U.S. at 306 and 307.

In *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), this Court distinguished between registration requirements and licensing taxes. It implicitly approved a regulatory system which required solicitors to "give their names, addresses and other marks of identification to the authorities." Id. at 113. The District Court in its Memorandum Opinion observed that the Seventh-day Adventist Church had agreed that it would voluntarily register with the City and provide the City with identification of the type contemplated in *Cantwell.* Such information would establish the identity and authority of a solicitor. (See Appellants' Appendix p. 21a). The Church agreed to provide the following information as a reasonable alternative to the City's ordinance:

(1) Name, address, telephone number of local church.

(2) Name, address, telephone number of local pastor.

(3) Name, address, telephone number of layperson in charge of Ingathering campaign.

(4) Name, address, telephone of local conference official who supervises Ingathering.

(5) Sample of literature to be distributed.

(6) Rationale for the Ingathering campaign:

(a) To place Seventh-day Adventist literature in every home;

(b) To enroll interested persons in a Bible correspondence course;

(c) To offer everyone an opportunity to give a freewill offering to help support the

worldwide work of the Seventh-day Adventist Church;

(d) To pray for individuals in their homes; and

(e) To interest individuals in the Seventh-day Adventist Church.

(7) Sample of identification carried by volunteer workers.

(8) Dates and, where necessary, hours of the door-to-door evangelism.

The City argues that the purpose of the Ordinance is "to protect its citizens from fraudulent and deceptive practices in connection with charitable solicitations." (See Appellants' Jurisdictional Statement, p. 7). And, this Court has held that a state may indeed protect its citizens from fraudulent solicitation. Such protection, however is available through existing penal laws and by registration and not the licensing of a religous activity. *Cantwell* v. *Connecticut, supra; Murdock* v. *Pennsylvania, supra.*

This Court's continuing critical scrutiny of the means applied by the state for the protection of its citizens against fraud in the area of door-to-door solicitation recognizes that the solicitation of funds is an activity fully within the protection of the First Amendment. *Village of Schaumburg* v. *Citizens for a Better Environment,* 100 S.Ct. 826, 833-35 (1980); *Murdock* v. *Pennsylvania, supra* at 109-11; *Cantwell* v. *Connecticut, supra* at 304-05; *Schneider* v. *New Jersey,* 308 U.S. 147, 160 (1939); and *Lovell* v. *Griffin,* 303 U.S. 444, 450 (1938).

It follows that any law which subjects First Amendment expression to a prior restraint of governmental permission bears "a heavy presumption against its validity." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 558 (1975), quoting *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963).

In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), a three-step balancing test was articulated to resolve conflicts between First Amendment religion-clause rights and state interests. The test seeks to determine: 1) whether there is a burden imposed on the exercise of religion? *Id.* at 403. 2) If such a burden is found, whether the infringement is justified by a compelling governmental interest? *Id.* at 406. And 3) if a compelling governmental interest does exist, whether there is any less intrusive alternate means available to meet the state's objective? *Id.* at 407. This Court has made clear that any governmental interest would not overbalance a free exercise claim. The interest must be shown to involve a grave and paramount state concern. *Id.* at 406.

The "least intrusive alternative" aspect of the *Sherbert* test is not a new First Amendment concept. It had been previously enunciated in *Shelton* v. *Tucker,* 364 U.S. 479 (1960). There the Court ruled that even though the governmental purpose may have been legitimate and substantial, such a purpose could not be achieved by means that infringed upon fundamental personal liberties should a less intrusive method of resolving the governmental concern be available. "[T]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 488.

In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), citing *Sherbert*, this Court held that there must be a state interest of sufficient magnitude to override an individual claim to protection under the free exercise of religion clause of the First Amendment: "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can over-balance legitimate claims to the free exercise of religion." *Id.* at 215.

In a case involving either governmental infringement of free exercise rights or state intrusion into church institutional concerns, a heavy burden of proof falls upon the government to establish the existence of a compelling state interest in the absence of any less violative method of attaining the government's objective.

It is clear that the government cannot meet this heavy burden imposed by *Sherbert* by simply asserting the existence of some generally recognized interest, such as fraud. For as Professor Tribe has stated:

> In applying the least intrusive alternative-compelling interest requirement, it is crucial to avoid the error of equating the state's interest in denying an exemption with the state's usually much greater interest in maintaining the underlying rule or program for unexceptional cases. Only the first interest—that in denying an exemption—is constitutionally relevant when an exemption is sought.

L. Tribe, *American Constitutional Law* 855 (1978).

In other words specific governmental restrictions or limitations on First Amendment liberties can only be justified by the government establishing the existence

of a compelling governmental interest which is unachievable by a less restrictive pinpointed alternative. Even a legitimate governmental purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Shelton, supra* at 488; *Elrod* v. *Burns,* 427 U.S. 347, 362 (1976).

The Court in *Schaumburg, supra,* observed that although a municipality has a legitimate interest to prevent fraud in door-to-door charitable solicitations, it must do so by narrowly drawn regulations, designed to serve those interests without unnecessarily interfering with First Amendment freedoms.

The City of Albuquerque, has exempted the solicitation programs of certain religious organizations from the application of its licensing requirements. The Ordinance attempts to define what the City perceives to be religious. In so doing it requires the Seventh-day Adventist Church's door-to-door evangelistic outreach program to be licensed. This consequence follows even though the philosophy, objectives, and methods of the Church's Ingathering program, constitute a religious ministry for the sick, for the hungry, for clothing of the naked, and the education of children and youth.

The Church considers its Ingathering program a direct response to Christ's directives as found in Matthew 25:31-46. The annual Ingathering appeal is part of a many-sided evangelistic program fostered by the Church to reach its neighbors. It is a spiritual ministry intended for every home which includes a visit and *Bible* course enrollment; the presentation of a brochure explaining the work of the church, and giving the pub-

lic an opportunity to contribute to the Church's worldwide program. (Stip. Fact 6).

Judge Barrett of the Tenth Circuit, in his dissenting opinion, while acknowledging that defining "religion" for the purpose of First Amendment rights is "one of the most trying and vexing tasks found in constitutional law" (Appendix to Appellants' Jurisdictional Statement, p. 11a), nevertheless sought a definition by means of "common sense approach." (Appendix to Appellants' Jurisdictional Statement, p. 12a). Any such approach, however, leads to a constitutional quagmire. Judge Barrett argued that "a distinction must be drawn, . . . between those activities characteristic of secular life, historically of primary and compelling concern of the community and government, which are also pursued by religious organizations." (Appellants' Appendix to Jurisdictional Statement, p. 13a). In fact, the Church's Ingathering program, as mandated by Christ's own words, represents a 2000-year Christian ministry that has only recently been abandoned by many churches and secularized by government.

The state may not nullify the protection afforded religion and religious practices, observances, and beliefs by itself performing similar services that have been stripped of their religious meaning. This point is illustrated here. One of the uses of Ingathering funds received by the Church, which the city has claimed to be secular, is support of the extensive parochial educational system operated by the Seventh-day Adventist Church. The City contends that the educational activities of the Church would come within the meaning of "secular" as the term is defined in the Ordinance and

interpreted by the city (Stip. Fact, p. 8), presumably because the state operates a school system. This Court, however, has long recognized the religious character of a church's educational program and found it a protected religious activity. *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490 (1979). It has recognized the nature of an educational system which although generally serving educational needs of society, are established for different purposes. Public schools serve purely educational needs and satisfy the secular requirements of society. Parochial schools, however, also inculcate religious values and have a distinctive religious purpose. See *Abington* v. *Schempp,* 374 U.S. 203, 242 (1963) (Brennan, J. concurring opinion).

Education historically has been an important and integral part of religious ministry and is an integral part of the Judeo-Christian religious tradition. A canon attributed to the Sixth Ecumenical Council of Constantinople in 680-81 A.D. required priests to maintain schools for children. J. Bingham, *The Antiquities of the Christian Church,* Book 8, ch. 7, § 12 (1856). In this country several denominations spend large portions of their funds for their educational ministries in providing sectarian education. As this Court noted in *Meek* v. *Pittenger,* 421 U.S. 349, 366 (1975), "the very purpose of many [sectarian] schools is to provide an integrated secular and religious education; the teaching process, is, to a large extent, devoted to the inculcation of religious values and beliefs."

In light of the long line of parochiaid cases decided by this Court, it is difficult to understand how a municiple legislative body, in making a "common sense"

determination as to what is secular and what is religious, could conclude that the solicitation of funds by a church to be used in part for maintaining parochial schools is subject to municipal licensing. Here we see the anomaly of government claiming that the solicitation of funds by a church for its church-operated elementary and secondary schools must be licensed because that aspect of the church's work is secular and not religious. This is illustrative of the difficulty of a legislative body attempting to define on its own what is secular and what is religious.

The Supreme Court has repeatedly insisted that the government cannot examine a religious belief as part of its exercise of police power. *U.S.* v. *Ballard,* 332 U.S. 78 (1944), held that the freedom of religion barred inquiry into the truth or falsity of belief. Similarly this Court has ruled that the government may not decide what is sacreligious. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952). Judicial determination of religious sincerity and status is a most sensitive undertaking. *Gillette* v. *United States,* 401 U.S. 437, 457 (1971), (whether a belief is "truly held" is open to question, the "truth of a belief" is not); *Wisconsin* v. *Yoder, supra* at 219-29 and 235 (sincerety of religious belief demonstrated by conduct); *Founding Church of Scientology* v. *United States,* 409 F.2d 1146, 1162 (D.C. Cir. 1969), *cert. denied,* 396 U.S. 963 (1969) (declining to hold summarily that plaintiff is a religion; claim of religious status is subject to contradiction by showing of insincerity of belief). Thus the City of Albuquerque treads upon dangerous grounds when it attempts to determine that an historic church activity is secular and not religious.

A California jurist has astutely observed that freedom of:

> "... religious thought and action cannot be whittled away by carving out segments of religious activities and relegating them to the realm of secular affairs. If that were permitted, the right or action for a religious purpose could eventually be destroyed by the gradual severance and classification as secular of every activity undertaken to promote the religious purpose." *Gospel Army* v. *City of Los Angeles,* 163 P.2d 704, 719 (1945) (Dissent).

In the instant case the city has offered absolutely no evidence calling into question the sincerity of the Adventist teaching that the church is Biblically required to minister not only to the spiritual but also to the physical needs of humanity. As the Court of Appeals noted, the City argues that the ordinance in question does not require a determination as to what is religious for the purpose of censoring the activity "but merely for imposing reasonable regulations for preventing fraud and other similar conduct." The appeals court was not persuaded by this contention and noted that this Court in *Cantwell* found that an administrative determination as to what was religious is objectionable (Appendix to Appellants' Jurisdictional Statement, p. 8a).

The Court of Appeals recognized that an organization might falsify its purpose. That, however, is a factual question which, on the record, is not faced by this Court. There is not the slightest suggestion that the activities for which the Church receives funds in its Ingathering program are not a bona fide aspect of the Church's religious ministry.

The Ordinance focuses upon the nature of the need served by the expenditure of funds received by the Church, rather than on the nature of the exempt organization. In so doing, it has made given preference to certain church expenditures, and assumed a role of deciding what constitutes religious activity. It has approved the religious programs of some churches while casting a burden on the programs of other churches. Particularly disturbing is the attempt by the City to classify what activity of a church is religious and what is secular. Such a classification does not aid in separating those church activities which may be more susceptible to working fraud upon the citizens of the City. For example, if a church should choose to solicit donations to squander on a lavish church structure, such a church would be exempt from the Albuquerque licensing requirements. If, however, it builds a sectarian school building, provides funds for the operation of a sectarian hospital, or conducts a religiously motivated stop-smoking clinic, it is not exempt, and the City insists on licensing those parts of the church's ministry. The legislative discrimination here involved smacks of "religious gerrymandering," criticized in *Gillette* v. *United States, supra* at 452.

The City contends that the requirements of the ordinance are reasonably related to a legitimate governmental purpose (Appellants' Jurisdictional Statement, p. 8). It is submitted, however, that *Sherbert* v. *Verner, supra,* rejected a rational relationship test in cases involving the free exercise clause of the First Amendment. In *Sherbert,* this Court held that when balancing the interest of the state against free exercise rights "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation, *id.* at

406, citing *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). Under *Sherbert*, a searching examination of the government's claimed compelling state interest is mandated. The *Sherbert* test may not be met by a mere assertion that a legislative act is reasonably related to a legitimate governmental purpose. See also *Buckley* v. *Valeo*, 424 U.S. 164 (1976); *Gibson* v. *Florida*, 372 U.S. 539, 558 (1963); *NAACP* v. *Button*, 371 U.S. 415 (1936); *Shelton* v. *Tucker*, *supra* at 479; *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958).

The City also argues that its determination, under the Ordinance, that the purpose for which funds are solicited are not "evangelical, missionary or religious" does not render solicitation by a group claiming some religious affiliation unlawful or deny that group the right to disseminate religious views. Here the City contends that if the solicitation Review Board finds in the light of this definition of "secular" that the purpose of the solicitation by a group claiming some religious affiliation is secular, the only consequence of that determination is that the group must obtain a permit and disclose to the public how the money solicited will be used (Appellants' Jurisdictional Statement, pp. 8 & 9). The city, however, treats too lightly the impact of its ordinance requirement. In a case somewhat similar, the Eighth Circuit, in *Valente* v. *Larson*, Nos. 80-1131 and 80-1159 (filed January 7, 1981), found a similar provision in a state statute placed a significant burden upon the groups subject to the act, particularly where, as here, there was an open-ended provision permitting the government to obtain such other information as the government might require.

Requiring a church to go before a governmental agency or official to obtain a "license" to carry out

its religious mission implies and tacitly acknowledges the absolute right of the state to withhold or withdraw that permission. Such authority should never be granted to the state except for the most compelling needs of society and then, only when no less intrusive means is available, then, only with the greatest of procedural safeguards. Conversely, the state should not expect a church to lightly permit the relinquishing of any aspect of its rights to engage in a religious mission. The impeding of a church's religious activities by the state can never be dismissed as a *de minimus* harm excusing the careful application of the *Sherbert* test.

It must be remembered that the activity which the city here seeks to license—the door-to-door ministry of the Adventist Church—is beyond question, religious in nature. There has been no evidence introduced even hinting that the Ingathering program, which the City claims must be subject to its licensing requirement, is a secular activity. The city has never advanced the argument that the Church is not carrying out its religious mission when it conducts this program. The city only claims that the funds which are spent to provide food, clothing, shelter and money for the needy, summer camps for disadvantaged youth, counseling, health services and its parochial educational program are for a secular purpose. Yet the spending is not what is licensed, rather it is the religious ministry.

Apparently Judge Barrett in his dissenting opinion would apply a test unknown to this Court that the religious activities of a church or its members may be restrained by the government so long as that restraint was not "undue" or "excessive." (Appendix to Jurisdictional Statement, p. 13a). This, of course, repudiates

the least intrusive alternative/compelling state interest test of *Sherbert*. It also seems to jettison all of the decisional law on prior restraints on First Amendment rights. See *Southeastern Promotions, Ltd.* v. *Conrad, supra* at 558; *ISKCON* v. *Rockford*, 558 F.2d 263, 271 (7th Cir. 1978); *Bantam Books* v. *Sullivan, supra.*

Furthermore, any restraint on the exercise of Appellees' First Amendment rights must also supply adequate safeguards of procedural due process to insure available, corrective review of a decision to deny or limit those freedoms. The procedures set forth in Section 11(A) of the Ordinance fall short of the due process requirements. *Freedman* v. *Maryland*, 380 U.S. 51 (1965). *Freedman* requires that the government bear the burden of justifying restraints on First Amendment activities. Thus a First Amendment licensor must grant or deny a permit: within a specific time; the licensing scheme require the licensor either to issue a permit or to institute, quickly, a judicial proceeding for an injunction to restrain the proposed activities; the licensor shall assume the burden of proof in such proceedings; and that the licensing scheme must assure a "prompt judicial decision" reviewing any "interim and possible erroneous denial of a license." *Id.* at 59. The Albuquerque Ordinance fails to meet almost all of these requirements.

The parties stipulated that the Seventh-day Adventist Church offered to register and give certain information as a reasonable alternative to the licensing requirement. The city failed to present any evidence demonstrating why this less intrusive alternative to the licensing requirement would not have met whatever compelling governmental concern there might exist. Pertinent to this failure of proof on the part of the

City is that the City made no showing why its citizens would have been subject to any greater chance of fraud when the Church used a portion of the funds for its educational and welfare ministries rather than exclusively for paying its ministers or building churches, or some other purpose which the City perceives to be within its own unique and novel definition of "religion."

CONCLUSION

The decision of the Cuort of Appeals properly rests on long standing Supreme Court precedent. Appellees respectfully request this Court, for the reasons herein stated, to affirm that judgment.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. CIV 78-915-B

JOSEPH ESPINOSA, et al., *Plaintiffs*,

vs.

DAVID RUSK, et al., *Defendants*.

Stipulation of Facts

1. The individual Plaintiffs are Joseph Espinosa, Charles Shobe, Morton L. Dunkin, and the General Conference Corporation of Seventh-day Adventists. The individual Plaintiffs named are members of the Seventh-day Adventist Church and citizens of the United States. Joseph Espinosa is the Community Services Director of the Texico Conference of Seventh-day Adventists and as such is the person assigned by the Seventh-day Adventist Church to supervise the 33 Seventh-day Adventist churches in New Mexico and their 2,109 members. Charles Shobe is pastor of a Seventh-day Adventist church in Albuquerque, which is a part of the Texico Conference of Seventh-day Adventists, and he will personally participate in the campaign of literature distribution and the collection of funds. He will supervise other workers including local members of the Church in Albuquerque. Finally, Morton L. Dunkin is a member of the Albuquerque, New Mexico, Seventh-day Adventist Church. He is a lay person who has assumed the responsibility for directing the Ingathering program of his church as well as participating directly in the solicitation and collection of funds incident to this program.

2. The Defendants, Mayor and Members of the City Council of the City of Albuquerque, are the duly elected officials of a municipal corporation organized and existing

under the laws of the state of New Mexico. Defendant David Rusk is the duly elected Mayor of the City of Albuquerque. Defendants Patrick Baca, Joe R. Abeyta, Mel Aragon, Thomas W. Hoover, Sandra L. West, Alan B. Reed, Jo McAleese, Jim Delleney, and Marion M. Cottrell are duly elected Council members of the City of Albuquerque. Defendant, Bob V. Stover is the Chief of Police for the City of Albuquerque and as such is charged with the responsibility for the enforcement of the City's ordinances, including the specific Ordinance at issue in this case.

3. The City of Albuquerque, New Mexico, enacted Ordinance 72-1975 to regulate charitable solicitations in the City limits.

4. The Seventh-day Adventist Church is a "charitable organization" within the meaning of Albuquerque Ordinance No. 72-1975 since it purports to have a charitable nature and solicits and collects contributions for charitable purposes within the City of Albuquerque, New Mexico, as a part of the Ingathering Program.

5. The City of Albuquerque believes that the Ordinance, in light of its definition of "secular," applies to the Seventh-day Adventist Church in its Ingathering program and that the Church must obtain a permit to solicit contributions in connection with said program.

6. The Seventh-day Adventist Church conducts an annual Ingathering program in most countries. The philosophy, objectives, and methods of the Church's Ingathering program were stated as follows by the 1971 Autumn Council of the General Conference of Seventh-day Adventists:

> Seventh-day Adventists have conducted their Annual Ingathering Appeal for more than 60 years. Each year since 1908, they have attempted to reach every home in the nation with their spiritual message. They believe that Christ is the only hope for a world plagued with runaway crime, devastating wars, polluted environ-

ment and exploding population. Their aim "to teach all nations the everlasting gospel of our Lord . . . and the commandments of God" sums up their reason for a steady, consistent witness to the world about them.

Behind their mission to humanity is the Adventist concept of man. To them, man represents a physical, mental and spiritual entity. To meet his needs, these Christian people feel they must minister not just to one, but to all aspects of his being. Thus the humanitarian work fostered by the Adventists includes more than the preaching of the Word. It also comprehends a healing ministry for the sick, the feeding of the hungry, the clothing of the naked, the education of children and youth. In their work, the Adventists endeavor to serve all aspects of man's being—physical, mental, and spiritual. They work for the wholeness of life and for the wholeness of man. This, in substance, is their reason for existence.

The Annual Ingathering Appeal is part of a many-sided evangelistic program fostered by Adventists to reach their neighbors. Its spiritual ministry is intended for every home. Its Bible course enrollments are offered to all people interested in knowing more about God and his revelation to man. A brochure is customarily presented explaining the work of the church and giving the public an opportunity to contribute to its worldwide program. Those who present these booklets contribute their time as well as their monetary gifts to bring to the world the biblical message of an unfailing hope in God. They invite others to join hands with them in this humanitarian and spiritual undertaking.

7. "These Times: Ingathering Appeal" is a sample of the kinds of brochures distributed to the public by Seventh-day Adventist participants in the Ingathering campaign and

which were in fact used in the City of Albuquerque. This pamphlet explains the mission of the Seventh-day Adventist Church and some of the purposes for which the Ingathering funds are spent.

8. "These Times" specifies that money solicited during the Ingathering Appeal is spent for medical, community services, educational and evangelical purposes. In particular, the Church uses funds solicited to provide food, clothing, shelter and money for the needy; summer camps for disadvantaged youth; counseling; health services, such as testing for diabetes, blood pressure, pulmonary function, and glaucoma, and providing health and nutritional courses; and education, through 532 high schools and colleges worldwide. These latter would all come within the meaning of "secular" as this term is defined in the Ordinance and interpreted by the City. The City has advised the Plaintiffs of this interpretation and expressed its intent to enforce the Ordinance with respect to Plaintiffs' Ingathering Appeal.

9. The Seventh-day Adventist Church publishes a pamphlet entitled, "A Quick Look at Seventh-day Adventists-1979" which enumerates many facts about the size of the Church and the breadth of its activities.

10. The Adventist Church funds its Ingathering Appeal from revenues other than those derived from the Appeal itself. Thus, 100% of the funds solicited are used for the worldwide outreach of the Church as set forth in the pamphlet "These Times." Furthermore, for purposes of Ordinance No. 72-1975, the Adventists' costs are zero.

11. The amount of the funds solicited through the Ingathering Appeal has exceeded in the past and is expected to exceed in the future, one thousand dollars.

12. The Seventh-day Adventist Church, and the Plaintiffs herein, believe that welfare programs that serve the physical needs of humanity are mandated by the Holy Bible.

13. The Seventh-day Adventist Church and the individual Plaintiffs believe the door-to-door contacts with the citizens of Albuquerque during the Church's Annual Ingathering program are an important aspect of the free exercise of their religious beliefs as guaranteed by the First and Fourteenth Amendments of the Constitution of the United States.

14. The Seventh-day Adventist Churches in the Albuquerque area and their respective memberships are as follows:

1) Central Church—229 members
2) Heights Church—295 members
3) Albuquerque Spanish Church—290 members
4) Albuquerque Southwest Spanish Church—25 members
5) Academy (Corrales)—129 members
6) Conference Isolated Church—21 members

15. It is conceded that the protection of the public from fraud is a legitimate interest of the City of Albuquerque.

/s/ JOHN WILLIAMS
Attorney for Plaintiffs

/s/ SUSAN GREEN
Attorney for Defendants

I certify that a copy of the foregoing Stipulation of Facts was mailed to all Counsel of record this 23rd day of January, 1979.

/s/ SUSAN GREEN